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In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1158

REUBEN G. LENSKE,
Petitioner,

vs.

THE STATE OF OREGON, ex rel
THE OREGON STATE BAR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

REUBEN G. LENSKE,
1014 S.W. 2nd Ave.,
Portland, Oregon,
Petitioner pro se.

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To the Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, Reuben G. Lenske, respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of the State of Oregon entered on September 9, 1965 permitting Oregon State Bar, the relator, to file amended or additional affidavit and the order of conviction of petitioner of November 3, 1965 and its assessment of a fine greater than the maximum permitted under ORS 33.020(1) and its order of December 29, 1965 denying petitioner's timely filed motion for a hearing and to set aside its order of November 3, 1965,

and to review its order of January 18, 1966 allowing costs against petitioner of $764.40. Petitioner will refer to the reporter's transcript as (Tr.) and the clerk's record as (R.) and appendix as App; and this Petition as P.

CITATION TO OPINIONS BELOW

The written opinion of the Supreme Court of the State of Oregon of September 9, 1965 appears in 81 Oregon Advance Sheets 161, 405 P2d 510 (1965) and the written opinion of November 3, 1965 appears in 81 Oregon Advance Sheets 447, and the order denying motion for hearing and to set aside opinion was entered without written opinion on December 29, 1965 and the order allowing costs of $764.40 against petitioner was entered without written opinion on January 18, 1966. The Referee's Report, his General Findings and his Findings on the charge in issue as well as the written opinions of the Court are set forth in the appendix hereto.

JURISDICTION

The first opinion was entered September 9, 1965, the second opinion was entered November 3, 1965, a motion to set aside the second opinion and for a hearing was timely filed on November 22, 1965, the order denying the motion was filed on December 29, 1965 and the order allowing costs was entered on January 18, 1966.

The jurisdiction of this Court is invoked under 28 USC 1257(3).

Questions Presented

1. Is the right of any citizen to inquire of a lawyer whether a civil matter in litigation is susceptible of compromise a right protected by:

a. Amendments I and XIV of the U. S. Constitution guaranteeing every citizen against abridgement of freedom of speech?

b. Article I Sec. 8 of the Oregon constitution guaranteeing "the right to speak".

2. Is the denial of a trial by jury in a criminal prosecution for an alleged indirect contempt

a. a violation of Amendment VI of the U. S. Constitution which guarantees an accused a "public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *"

b. a violation of Article I of the Bill of Rights of the Oregon Constitution, Sec. 11, which provides "In all criminal prosecutions, the accused shall have right to public trial by an impartial jury in the county in which the offense shall have been committed * * *"

3. Is the trial of an accused in a criminal prosecution for indirect contempt alleged to have been com-

mitted in Salem (Marion County), Oregon, before a Referee in Portland (Multnomah County), Oregon.

a. a violation of Amendment VI of the U. S. Constitution which guarantees an accused "public trial, by an impartial jury of the state and district wherein the crime shall have been committed * * *"

b. a violation of Article I of the Bill of Rights of the Oregon Constitution, Sec. 11, which provides "In all criminal prosecutions, the accused shall have right to public trial by an impartial jury in the county in which the offense shall have been committed * * *"

4. Is it a violation of the due process clauses of the Fifth and Fourteenth Amendments to the U. S. Constitution:

a. To suspend a member lawyer of the Oregon State Bar without a hearing and

b. To make the suspension indefinite in time, and

c. Without any reference to disbarment proceedings based on the same ground as the suspension, and

d. To maintain contempt proceedings for violation of the suspension order, while

e. Keeping the disbarment proceedings dormant and untried, and

f. Without serving the suspension order or giving notice of it except by mailing the lawyer an uncertified and unsigned copy of a letter addressed to the secretary of the Oregon State Bar, and

g. Without exhibiting to the accused in the contempt hearing or introducing as evidence, the Court's suspension order?

5. Was the Oregon Supreme Court's holding as unconstitutional ORS 33.020(1) which limits the punishment to $100 and its imposition of a fine of $500 plus $764.40 costs on petitioner

a. a judicial bill of attainder and ex post fact law in violation of:

(1) Article I Sec. 9, of the U. S. Constitution?

(2) Article I Sec. 21 of the Oregon Constitution?

(3) Article I Sec. 16 of the Oregon Constitution?

b. Usurpation by the Judicial branch of Oregon of powers granted to the legislative branch in violation of:

(1) Article III, Sec. 1 of the Oregon Constitution.

6. Is the denial of a motion and affidavit of prejudice against a Referee in form and substance as required under ORS 14.260 for the disqualification of judges and where there is no counter-affidavit or evidence a violation of:

a. Amendments V and XIV of the U. S. Constitution guaranteeing due process and the equal protection of the laws.

b. Article I, Sec. 1 of the Bill of Rights of the Oregon Constitution.

c. Article I, Sec. 20 of the Bill of Rights of the Oregon Constitution.

7. Does the Oregon Supreme Court have original jurisdiction to try contempt cases for violation of an order suspending a lawyer from practicing law in Oregon?

8. Is a defendant who is being tried by the Oregon Supreme Court for contempt entitled to be tried by the Court itself and be confronted by it, rather than a referee?

Statutes Involved

ORS 33.020(1)

"* * * when the contempt is not one of those mentioned in paragraphs (a) and (b) of subsection (1) of ORS 33.010, or in subsection (1) of ORS 1.240, it must appear that the right or remedy of a party to

an action, suit or proceeding was defeated or prejudiced thereby before the contempt can be punished otherwise than by a fine not exceeding $100."

ORS 14.250

"No judge of a circuit court of the State of Oregon * * * shall sit to hear or try any suit, action, matter or proceeding when it shall be established, as provided in ORS 14.250 * * * that such judge is prejudiced against any party * * *"

ORS 14.260

"Any party to * * * cause, matter or proceeding in any cause, matter or proceeding in a circuit * * * may establish the prejudice described in ORS 14.250 by motion supported by affidavit that the judge * * * is prejudiced against such party * * * so that such party * * * cannot or believes that he cannot have a fair and impartial trial or hearing before such judge, and that it is made in good faith and not for the purpose of delay * * * No party * * * shall be permitted to make more than two applications in any cause * * *"

STATEMENT OF THE CASE

Petitioner was, until April 28, 1964, an attorney in good standing who had practiced law in Portland, Oregon since 1925. On April 28, 1964 an order suspending him from the practice of law in Oregon was entered ex

parte by the Supreme Court of the State of Oregon without previous notice to petitioner and without any hearing.

On June 4, 1964 disbarment proceedings were commenced against petitioner by relator, Oregon State Bar, on the same ground as the suspension, which petitioner contested and to this date no steps were taken by relator to try the disbarment proceeding. TR330, 484-6

However, on November 27, 1965, relator filed a motion R5 and affidavits with the Supreme Court of the State of Oregon and that Court issued an order R30 requiring petitioner to show cause why he should not be adjudged in contempt for violating the order of suspension. Petitioner filed a motion R23 to strike the affidavits and R24 to set aside the order to show cause for* insufficiency of the affidavits and** because petitioner's constitutional rights were being violated by both the suspension order and the order to show cause. On hearing, the Supreme Court of Oregon denied the motions on January 27, 1965. The Court also denied petitioner's de-

R24

* (3) Each of the affidavits upon which the motion was based fails to state sufficient facts upon which to base said order."

** "(5) The suspension of a lawyer in good standing before any Bar without notice of the recommendation of suspension and without a hearing constitutes a violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 1 and section 20 of the Constitution of Oregon in that such action is a violation in taking of property without due process of law and is a denial of the equal protection of the law."

"(6) Said Order to Show Cause and the motion upon which it is based seek to deprive defendant of his rights under the First Amendment to the United States Constitution as applied under the Fourteenth Amendment of the United States Constitution and also Section 8 of Article I of the Constitution of Oregon."

mand for a jury trial and referred the matter to a Referee, a Multnomah County Circuit Court judge. R27

Petitioner filed a timely motion and affidavit of prejudice against the Referee R29 in form and substance conforming to ORS 14.260 and in form and substance that were generally allowed by Oregon trial courts but petitioner's motion was denied. (Tr. 470-472) R31

Hearing was had before the Referee, in Portland, Multnomah (Tr. 1) County, Oregon, the relator being represented by three counsel and petitioner acting as his own counsel, testimony was adduced, arguments of counsel were presented and on July 9, 1965, the Referee filed his Report R39 to the Oregon Supreme Court. He made no finding on wilfullness or intent and neither he nor the Supreme Court allowed a hearing on exceptions to the findings or permission to file briefs. R

The Oregon Supreme Court filed an opinion on September 9, 1965, App. 27 holding that the proceeding against petitioner was "one of criminal contempt," App. 29 and that the affidavits, App. 33 which were in the nature of indictments, were insufficient because they failed to allege "the issuance of the order of suspension or of knowledge by defendant of its issuance and further ordered that the relator may, App. 34 "file an amended or additional affidavit."

The relator filed additional affidavits R52-54 and the Court, without further testimony and, without ruling on peti-

tioner's motion for oral argument and for the filing of briefs, rendered its opinion of November 3, 1965 finding petitioner guilty of an indirect contempt committed in Salem (Marion County), Oregon, and holding that ORS 33.020(1) limiting punishment for such contempt to a $100 fine unconstitutional, and fining petitioner $500.

Within the twenty days provided by Rule for filing petitions for rehearing petitioner filed a motion for hearing and to set aside the opinion of November 3, 1965 and for an opportunity to present oral argument and written brief. This motion was denied on December 29, 1965.

Although the Oregon Supreme Court opinion made no mention of costs, the relator filed a cost bill, petitioner duly filed objections thereto, and on January 18, 1966 the Court allowed costs against petitioner in the sum of $764.40.

On November 27, 1965 Charles O. Porter, a member of the Oregon State Bar, filed application to file a brief as amicus curiae and this application was denied on December 29, 1965.

REASONS FOR GRANTING THE WRIT

Trial by Jury

Both the Oregon and U. S. Constitutions guarantee a right to trial by jury in a criminal case. Such right

has been generally denied in State Courts. By both Congressional act and under Rule 42 (b) of Federal Rules of Civil Procedure, jury trial is allowed on charges for indirect contempts *in many cases. This is in accord with* the Sixth Amendment of the U. S. Constitution. The Court said in the recent case of *Harris v. United States*, 382 U.S. 162, 167:

> "We are concerned solely with 'procedural regularity' which, as Mr. Justice Brandeis said in Burdeau v. McDowell, 256 U.S. 465, 477 (dissenting), has been 'a large factor' in the development of our liberty."

The time has now risen when the Court should consider the constitutionality under the Fifth, Sixth and Fourteenth Amendments to the U. S. Constitution of State Courts depriving persons charged with indirect contempts of a jury trial.

A demand by petitioner was filed for a jury trial as one of his first pleadings. In his opening statement before the Referee, petitioner stated (Tr. 65):

> "Mr. Lenske: I may add, your Honor, that these rights are guaranteed me by the Federal Constitution."

This statement followed discussions on my right to a jury trial along with other rights (Tr. 65). The Referee stated:

"The Referee: But this is a contempt proceeding * * *"

He further stated on page 82:

"The Referee: Well, as I understand your position, that is all covered by my prior ruling on the trial by a jury * * *"

First Amendment—Freedom of Speech

In holding me in contempt for inquiring about the possibility of a settlement of a civil case, the State Supreme Court violated the First Amendment as applied to States in the Fourteenth Amendment to the U. S. Constitution, guaranteeing every person freedom of speech.

This was raised in petitioner's Motion to Set Aside the State Court's Order to Show Cause, which petitioner filed on December 15, 1964, in which petitioner states:

"Said Order to Show Cause and the motion upon which it is based seek to deprive defendant of his rights under the First Amendment to the United States Constitution as applied under the Fourteenth Amendment of the United States Constitution and also Section 8 of the Article I of the Constitution of Oregon."

Petitioner stated (Tr. 76):

"* * * each affidavit and each allegation fails to set forth a reconciliation between the statements

in the affidavit and both the Oregon and the Federal Constitution guaranteeing natural rights and freedom of speech."

Petitioner further stated (Tr. 77):

"And, of course, your Honor is familiar with the First Amendment to the Federal Constitution, and I shall contend and I shall show that each item of contention by the plaintiff herein is an item which is in violation of each of these divisions in the respective Constitutions."

Following is the pertinent testimony of Eddie Nordyke, upon whose testimony the Court made the finding that petitioner practiced law (Tr. 104):

"Q. Now, exactly what was he trying to do in this Baker case by way of settlement?

A. I don't know, because I refused to discuss settlement with him, and no proposal or offer was made."

"By Mr. Lenske:

Q. Mr. Nordyke, did I, on either my behalf or anybody else's behalf, at that time, make any offer of any kind?

A. No, sir."

He further testified on (Tr. 107):

"Q. In the course of your duties as Assistant Attorney General, do you converse with only lawyers in the course of your employment?

A. No."

He testified (Tr. 111):

"Q. Well, did you ever discuss with non-lawyers the payment of money to the Unemployment Compensation—

A. Certainly.

Q. And was the Met-All Products matter that you were handling a matter relating to the moneys to the Unemployment Compensation Fund?

A. Certainly.

Q. As a public employee, do you consider it your duty to discuss with the members of the public, matters affecting contribution to the Unemployment Compensation Fund?

A. When I am called upon to do so, yes, sir."

Certainly the First Amendment protects the right of any citizen, lawyer or non-lawyer, to make such inquiry.

Trial in the District or County in which the offense is committed.

The Sixth Amendment of the U. S. Constitution guarantees an accused a trial in the "*state and district wherein the crime shall have been committed*" and Article I, Sec. 11 of the Oregon Constitution guarantees an accused a right to trial "in the county in which the offense shall have been committed". Eddie Nordyke testified (Tr. 102):

"* * * And Mr. Lenske called me sometime in the forenoon of that day and advised me that he was coming to Salem * * *"

He further said:

"And he did come, and he arrived a few minutes after twelve o'clock of that day in my office * * *"

Salem is in Marion County, Oregon and that is the County or District where the alleged crime was committed. The hearing before the Referee was held at "330 Multnomah County Court House, Portland, Oregon (Tr. 1).

The right to trial in the District or County of the alleged crime is a jurisdictional requirement of both the Oregon and U. S. Constitutions.

In re Kelly, 46 Fed. 653, 659

The affidavit of Eddie Nordyke stated: "That said Reuben G. Lenske did appear in Salem on said June 22, 1964 and did state * * *." The evidence is uncontradicted that the inquiry (alleged crime) occurred in a district and county other than where the Referee conducted the hearing. This issue was raised in the motion for hearing and to set aside the opinion of December 3, 1965.

Due process under the Fifth and Fourteenth Amendments and confrontation under the Sixth Amendment include the right to face and be faced by the trial court during trial and certainly immediately preceding and at sentencing.

Demand for confrontation was made by petitioner (Tr. 63). In submitting the matter to a referee who refused to consider or make findings on wilfullness or intent and in sentencing petitioner when the Supreme Court was fifty miles away from petitioner the Federal constitution was violated. The principle set forth by the Court in two recent cases on confrontation of witnesses should be no less controlling as to confrontation between the defendant and the trial and sentencing judge. The cases are:

Pointer v. Texas
380 U.S. 400, 403

Douglas v. Alabama
380 U.S. 415, 418

* The next two paragraphs relate to and follow the two paragraphs of page 19 on Judicial Bill of Attainder, etc.

The Oregon Supreme Court, in *Crouch v. Central Labor Council*, 134 Or. 612, 293 Pac. 729, 83 A.L.R. 193, 199 stated that "courts are as much subject to the constitution of the State as is the legislature of the State." Such a judicial raising of a fine for indirect contempt without notice of intention to do so is not only a violation

of due process but constitutes an effectual ex post facto law and bill of attainder by judicial act. This is at least as great a wrong as a congressional act would be under Article I, Sec. 9 of the U. S. Constitution.

This issue was not raised by petitioner until after the opinion was rendered on November 3, 1965, because he had no way of knowing that the Court had such intentions. However, petitioner did raise it in his Motion for Hearing and to set aside the Court's opinion, which petitioner filed on November 22, 1965, within the 20 days provided under Rule 47 of the Supreme Court of the State of Oregon, which appears in 235 Oregon on page (26). The rule provides "the petition, with accompanying brief, if any, shall be filed within 20 days from the date of the filing of the Court's opinion * * *" Rule 38 on page (23) provides that the "filing of a * * * petition for rehearing shall suspend further proceedings until the motion or petition is disposed of * * *".

Violation of due process under Fifth and Fourteenth Amendments

Question No. 4 of this brief and each of its subdivisions should be answered in the affirmative, from a to g. The suspension order is indefinite in time, no hearing of any kind was afforded petitioner before its entry, no legal notice of the order was ever served on petitioner —it was not even exhibited to him or introduced as an

exhibit at the hearing. The disbarment proceeding on the same ground as the suspension has remained in limbo (Tr. 330) while the contempt proceedings were prosecuted. The Referee himself expressed some concern about the status of a lawyer suspended without a definite termination period. (Tr 316-17) If each of the procedures from a to g in this case is not a violation of due process, certainly adding them all together does constitute lack of due process.

Although almost two years have expired since the suspension order and the commencement of the disbarment proceedings no hearing of any kind was afforded petitioner on the right to either suspend or disbar petitioner. At the hearing on contempt before the Referee petitioner said (Tr. 331)

> "I believe the suspension must be for a particular purpose, for a particular cause, and that it is the duty of the Bar, when it does take double action, to conclude their primary action within a reasonable length of time, so that the temporary action may not be, in temporariness, in lack of action in the primary action, become permanent itself."

and further, petitioner stated (page 334):

> "* * * I am ready to defend myself on them (disbarment proceedings) and they choose to let them rest. Now, if I should prevail on that, then there should be no suspension, and they—"

The Referee stated (page 334):

> "But none of those matters are of any concern to me, Mr. Lenske."

Judicial Bill of Attainder and Ex Post facto law.

The Supreme Court in its opinion declared 33.020 (1) of Oregon Revised Statutes' unconstitutional and fined petitioner $500 which was $400 more than the limit set by that Statute. Then it added on $764.40 in costs.

This occurred without the relator, the Referee or the Court raising that question at any time in the pleadings or at the hearing, or in any manner whatsoever prior to the rendition of the opinion on November 3, 1965.

No evidence of intent or wilfullness. * Now please read the paragraphs on page 16

There is not one iota of evidence of wrongful intent or wilfullness in the record. In its opinion the court cited as its sole basis of wilfullness, i.e., it did not point to anything else, petitioner's argument before the Referee. See fourth page of opinion of November 3, 1965. p 39 Petitioner's "attitude" when presenting argument should hardly be evidence of wilfullness a year prior

thereto. The argument was made when petitioner was his own counsel on June 1, 1965. The alleged contempt was June 22, 1964 (Tr. 102). Certainly intent or "attitude" should not be applied retroactively. The unfairness of the Court's use of this statement of petitioner during his argument becomes even more evident when one examines the context. The Referee asked petitioner (Tr. 610) whether he ordered letterheads printed after the order of suspension, i.e., whether such inference could be drawn from the fact that the zip code number is on the letterhead describing petitioner as an attorney at law.

Petitioner answered the Referee (Tr. 611):

> "I will be glad * * * to ascertain when the last order for stationery was, and bring the invoice in * * *"

Petitioner, in further explanation of the stationery order did say what the Court quoted which includes (Tr. 611):

> "I never expected and I don't expect to be disbarred; I never expected or intend to be convicted * * * And I do not believe that a person with that frame of mind is obligated to act other than and in accordance with what he is satisfied the effect of the law and the judgments should and will be * * *"

What is wrong about the "attitude" that petitioner, when he ordered stationery, believed that he was right and that right would prevail and he ordered stationery with that prognosis in mind? A plea of innocence and confidence in ultimate justice is evidence of neither guilt nor contumacy.

CONCLUSION

Many of the constitutional rights claimed by petitioner in this petition were claimed by him in the argument he presented to the Oregon Supreme Court on January 27, 1965. That argument was tape recorded by the Court's bailiff as in all matters that come before it and petitioner made a transcript of the recording. Petitioner believes that the tape recording or a transcript should be a part of the record on appeal but the Oregon Supreme Court has denied petitioner's request. Petitioner asks this court for reversal of that denial.

In view of the violation of basic constitutional rights of citizens by state courts in the field of equal voting rights and civil rights it should not be entirely surprising to the United States Supreme Court that occasionally state courts deprive an individual of a half a dozen constitutional rights in one case or one series of issues. Petitioner believes that the conviction against him should

be reversed after granting certiorari and that there is opportunity here for the United States Supreme Court to strengthen individual constitutional rights for many other persons who occasionally feel the wrongful sting of an unjust prosecution or a series of them.

Respectfully submitted,

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Appendix 1

Referee's
FINDINGS OF FACT

(July 9, 1965)

I

General Findings

1. There was entered herein on the 28th day of April, 1964, an order suspending the Defendant-Respondent from the practice of law in the State of Oregon under Rule I of the Rules of this Court.

2. Notification of the entry of the order was directed to Mr. John Holloway, Secretary of the Oregon State Bar, on said date and a copy of said correspondence was directed to the Defendant-Respondent at his address, 1014 S. W. 2nd Avenue, Portland, Oregon, and the copy received. (Tr. 498-499)

* * * * *

(Findings II, III, IV, VI and VII are specific findings on affidavits not now involved.)

V

Affidavit of Eddie Nordyke

1. The Defendant-Respondent represented the plaintiffs in an action entitled "Harry Baker and Elsie Baker,

dba Met-All Products vs. State of Oregon, Department of Employment, David H. Cameron, Department of Employment Commissioner", Multnomah County Circuit Case No. 282-898, at the time of trial, and commenced an appeal on behalf of the plaintiff, all prior to the entry of the order of Suspension. (Tr. 101-102)

2. On June 22, 1964, after the entry of the Order of Suspension, the defendant went to the offices of Mr. Nordyke, Assistant Attorney General of the State of Oregon, who represented the Department of Employment in this matter; at said time, on behalf of the Bakers and himself, defendant made overtures to Mr. Nordyke for the purpose of affecting a settlement of the litigation. (Tr. 102, et seq. and 479, 46 seq.)

3. The defendant did not make any specific offer of settlement and his overtures were limited to an unanswered inquiry as to whether the matter could be settled. (Tr. 102, 104, and 480) At the time of the conversations with Mr. Nordyke, the Defendant-Respondent was not a party to the litigation and no other attorney had been retained by the Bakers in connection with this matter. (Tr. page 481)

4. At this time the Defendant-Respondent had a personal but indirect interest in the outcome of the litiga-

tion based upon fees due for services rendered prior to the entry of the Order of Suspension and a contingent liability concerning the supsedeas bond on appeal. (Tr. 480-482)

* * * * *

Charles S. Crookham

Referee Designate
and
Circuit Judge

Appendix 2

No. 7966—September 9, 1965

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

AFFIDAVIT HELD INSUFFICIENT WITH LEAVE TO PLAINTIFF TO FILE AMENDED AFFIDAVIT.

HOLMAN, J.

Defendant is a member of the Oregon State Bar and wa sconvicted in the District Court of the United States for the District of Oregon of "* * * * wilfully and knowingly attempting to evade and defeat a large part of income tax due and owing by defendant * * *." The records of this court show that the Oregon State Bar filed with it a certified copy of the judgment of conviction; that, pursuant to Rule I of the rules of this court for admission of attorneys, this court summarily suspended defendant from the practice of law in Oregon; and that the Oregon State Bar was notified by letter of the order of suspension and a copy of the letter was mailed to the defendant.

Thereafter, the Oregon State Bar, as relator, instigated an original contempt proceeding in this court against defendant claiming he had violated the court's order of suspension by continuing to practice law and

holding himself out to the public and members of the bar as eligible to practice law. As a basis for this claim and its application for an order to show cause why he should not be punished for contempt, the relator filed with the court affidavits of different individuals setting forth certain alleged actions of the defendants which relator contends constitute the practice of law. Subsequent to the issuance of the order to show cause and after appearance by defendant, this court appointed a referee for the purpose of holding a hearing and taking testimony for this court and making findings.

The referee held a hearing and certified to the court the transcript of the testimony and his findings. The defendant ha sraised numerous objections to the findings and to the propriety of the proceeding, among which is the contention that the affidavits filed by the relator are insufficient upon which to base a proceeding of contempt. The affidavits allege neither the entry of the order of suspension by this court nor knowledge by the defendant concerning issuance and entry of such order.

Contempts are of two kinds, direct (ORS 33.030) which is in the presence of the court, and indirect (ORS 33.040) which is out of the presence of the court. This proceeding is an attempt to assert an indirect contempt.

Contempts may be civil or criminal. In a civil contempt the contemnor violates a decree or order of the court made for the benefit of an adverse party litigant. In a criminal contempt a court's process is violated or disobeyed and disrespect of the court is manifested *State ex rel Downing*, 40 Or 309, 322, 58 P 863 (1901); *State v. Sieber*, 49 Or 1, 8, 88 P 313 (1907). The present proceeding is one of criminal contempt.

The averments of an affidavit are essential to invoking the jurisdiction of the court. In *State ex rel Conn*, 37 Or 596, 598-599, 62 P 289 (1900), this court, in holding insufficient an affidavit reciting information and belief rather than facts, stated as follows:

> "Our statutes relating to the punishment of contempts provides that, when not committed in the immediate view and presence of the court, 'before any proceedings can be taken therein the facts constituting the contempt must be shown by an affidavit presented to the court or judicial officer:' Hill's Ann. Laws, § 653 [ORS 33.040]. This affidavit is essential to the jurisdiction of the court in all proceedings for constructive contempts (*State v. Kaiser*, 20 Or 50, 23 Pac. 964, 8 L.R.A. 548); and it must state facts which, if established, will constitute the offense. If it is insufficient in this respect, there is nothing to set the power of the court in motion, and it is without jurisdiction to proceed: [citations]. Now, a proceeding for contempt for violating an injunction is in its nature criminal [citations] and therefore the statute must be strictly pursued (4 Enc. Pl. & Prac. 770). * * * The statute * * * contemplates that the facts constituting the contempt shall be stated in a positive manner by

> some one conversant therewith. Indeed, a proper regard for the liberty of the citizen forbids any proceeding by which he may be deprived of his liberty without the information furnished by such an affidavit, and so the courts hold."

State ex rel Sieber, supra, at page 4, reiterates the same rule:

> "* * * As a violation of an injunction is a criminal contempt, the proceedings to punish a party accused thereof must be strictly pursued (4 Enc. Pl. & Pr. 770), and, in all cases of constructive contempt, the initiatory affidavit must state facts sufficient to constitute a *prima facie* case: 4 Enc. Pl. & Pr. § 780."

A naffidavit must allege the defendant was served with the order or that he had knowledge of it. *State ex rel Downing*, supra; *Trullinger v. Howe*, 58 Or 73, 113 P 4 (1911); *State v. Stillwell*, 80 Or 610, 157 P 970 (1916); *State ex rel Sieber*, supra at page 9. In the case of *Trullinger v. Howe*, supra, at page 79, the court stated as follows:

> "Before a party can be brought into contempt for not complying with an order or decree of court, service thereof must be made upon him, and a demand duly made that he comply therewith, unless it appear that he has personal knowledge or notice of such order or decree, and this must be shown by the affidavit upon which the proceedings are based: *State ex rel Downing*, 40 Or 314, 325 (58 Pac. 863: 66 Pac. 917), and cases there cited."

Mr. Justice Harris, in a specially concurring opinion in *State v. Stillwell*, supra, at page 616, said:

> "The affidavit must show either that a copy of the order has been served, or that the party has actual knowledge of the making of the order. * * *"

While the above cases are ones of civil contempt, with the exception of *State ex rel Sieber*, surely knowledge of the order prohibiting the thing claimed to have been done is equally, if not more, important in cases of criminal contempt.

Relative to the necessity of alleging the court's order in the affidavit and whether the court might take judicial notice of its own records as a substitute therefor, the court said in *State ex rel Sieber*, supra at page 5, as follows:

> "* * * The counsel for the relators, in support of the principle for which they contend, cite Ex parte Ah Men, 77 Cal. 198 (19 Pac. 380: 11 Am. St.Rep. 263), where it was held to be unnecessary to set forth, in an affidavit charging the violation of an injunction, the provisions of the writ that had been transgressed, because the court would take judicial notice of its own orders. The conclusion in that case was based on the fact that the practice prevailing in California permits the prosecution of a contempt to be made in the cause out of which the restraining order arose, and not in a separate proceeding with a title of its own. Such rule, however, does not obtain in this jurisdiction where contempt proceedings must be prosecuted in the name of the state or in its name on the relation of a private party:

> B. & C. Comp. § 667 [ORS 33.060]. * * * That a court will take judicial notice of its orders made in certain cases must be admitted, but the notice referred to is a rule of evidence only, whereby proof of the existence of such orders, by the production of the originals or certified copies thereof, may be dispensed with. * * *"

There are subsequent cases which hold that no service of the order or, in the alternative, knowledge need be alleged in the affidavit. *State ex rel Hambrecht v. Hambrecht*, 128 Or 305, 274 P 507 (1929); *State v. LaFollet*, 132 Or 257, 284 P 283 (1930); *State ex rel Grover v. Grover*, 158 Or 635, 77 P2d 430 (1938). However, these cases rest their decisions on the amendment to ORS 33.040 which was added by Chapter 165 Oregon Laws 1923:

> "* * * The affidavit shall set forth the facts constituting the contempt, but need not contain recitals of matters already appearing in the record of any action, suit or proceeding *in which the person charged with contempt has been personally served with* process. * * *" (Italics ours)

It is apparent that the amendment to the statute has no application to the present situation. At the time the affidavits were filed the defendant had not been served with process. Therefore, the fact that this court's records show both the order of suspension and the mail-

ing to defendant of a copy of the letter to the State Bar notifying it of defendant's suspension is of no avail to relator.

As they now stand the affidavits are not sufficient to make out a prima facie case of contempt against defendant because none of them contained any allegation of the issuance of the order of suspension or of knowledge by defendant of its issuance. The records of this court, of which judicial notice can be taken, furnish evidence of both the issuance of the order and defendant's knowledge. Rather than dismissing the proceeding on a technicality and not making a determination on the merits, this court believes it is desirable to give the relator an opportunity to file an amended or additional affidavit if it so desires. Authority for allowing the relator to furnish additional information by way of affidavit at the time of trial is furnished by *State ex rel Sieber*, supra, at page 6, where this court said:

> "* * * if on trial it should be ascertained that the affidavit initiating a contempt proceeding was not sufficiently specific in its charge, it may, with the court's consent, be amended by reverification * * *."

This court is presently in the act of trying the matter on the record as an original proceeding. The court's

action is analogous to the allowance of an amendment of the pleadings on trial.

The relator is allowed 15 days within which to file an amended or additional affidavit and the defendant is allowed a like time in which to present to this court by way of affidavit any evidence contravening any new matters stated in any amended or additional affidavit the relator may file.

Appendix 3

No. 8006—November 3, 1965

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

DEFENDANT CONVICTED AND FINED.

HOLMAN, J.

Since the preliminary opinion of this court, 81 OAS 161, 405 P2d 510 (1965), the relator, Oregon State Bar, has supplemented its affidavits so that they now allege facts which show both the issuance of this court's summary order of suspension of defendant from the practice of law and his knowledge of the issuance of such order. Defendant contends his knowledge of the issuance of the court's order is not sufficient to comply with due process in that he must be served formally with a certified copy of the order. Defendant's contention is not well taken and is not supported by the cases discussed in our preliminary opinion. As an officer of this court possessing knowledge of the order, defendant is bound thereby and cannot attempt evasion by insisting upon formalities. We therefore make a decision on the merits.

The relator, through its affidavits makes several contentions concerning the alleged practice of law by defendant during the period of his summary suspension.

It is unnecessary for this court to consider more than one of the charges. Relator filed an affidavit of an Assistant Attorney General of the State of Oregon assigned to the Department of Employment. The affidavit alleged: that at a time prior to suspension and during the trial of a case in Circuit Court in Multnomah County, defendant represented, as an attorney, persons who brought an action against the State of Oregon, Department of Employment; that in said case the affiant represented the Department of Employment; that the trial resulted in a judgment against defendant's client from which an appeal was filed by defendant prior to his suspension; that at a time after defendant's suspension, affiant received a telephone call from defendant notifying him that defendant would come to affiant's office in Salem; that defendant appeared the same day at affiant's office and said that he had come to discuss a possible compromise of that case; that affiant, aware of defendant's suspension, refused to discuss the settlement of the case even though the defendant protested that his actions in so doing would not constitute the practice of law.

On the hearing before the referee the affiant testified as follows:

> "A And he did come, and he arrived a few minutes after twelve o'clock of that day in my office, and he stated that he had come to discuss a possible settlement of the case now pending in the Supreme Court, the Harry Baker dba Met-All Products case,

and I at that time informed Mr. Lenske that I was aware of his suspension to practice law, and that I declined to discuss the case with him.

"Q What did he say to that?

"A Mr. Lenske disputed the—my conclusion that his conduct constituted the practice of law, and insisted on discussing the possible settlement, and I again refused to discuss any matter in which he purported to represent the Bakers, and that I also told him that I thought he was endangering his license, and that he should know better."

On cross-examination he testified:

"Q Isn't it a fact that the only question—only conversation that took place outside of the normal greeting was a question to you whether or not there was a possibility of settlement being made by Mr. Baker with you?

"A I don't recall the exact words that were used. It was my understanding that you said you wanted to know whether there was any possibility of reaching a settlement in the Harry Baker dba Met-All case, and I replied that I could not discuss this case with you, because you were under the suspension of the Oregon State Bar."

The defendant testified concerning the incident as follows:

"A I told him I did not want to interfere with his lunch hour and I would therefore be willing to have lunch with him, and he stated that he had some appointment with his boy, either to go home for lunch or somewhere else, and would not be able

to do so. I asked him then whether the Harry Baker unemployment compensation matter might be compromised. He promptly stated that he could not discuss the matter with me an dthat he felt that it would be his duty to report to the Oregon State Bar what did or would take place. He stated that—I stated to him that my questioning the possibility of a compromise was not, as he intimated, practicing law, and that was the substance of our conversation. I left the office, and I do not believe that I saw Mr. Nordyke since that date until he was in the courtroom."

Defendant, in his testimony, attempted to justify his actions upon the ground that he was acting in his own interest and not in that of a client because (1) he had a substantial fee involved which he had earned in the trial of the case, (2) his former client expected him to lend the money necessary to pay for the printing of the briefs on appeal, and (3) he had guaranteed against loss the person who signed his former client's supersedeas bond on appeal. Defendant also testified that it was necessary for him to know whether the case could be settled because his former client would expect recommendation of another lawyer to complete the case and the choice depended upon whether or not the case could be settled.

An inquiry made of the opposing attorney as to whether a case may be settled, at a time when the case is on appeal to the Supreme Court, by one who tried the

case as an attorney in the trial court and filed the appeal and who has no interest in the case except that which he has acquired as an attorney, constitutes a fact from which this court can conclude that such person is practicing law. We so conclude. Though this is a criminal contempt, it is not a criminal prosecution within the meaning of the constitution, *State ex rel Sieber*, 49 Or 1, 11, 88 P 313. The evidence seems to us to be clear.

Defendant's attitude is best summed up by the following statement made to the referee as part of his argument at the completion of the testimony.

> "I will say this, however, and that is I think that the Court can well infer from the testimony if it hasn't been said. I never expected and I don't—I never expected and I don't expect to be disbarred; I never expected or intend to be convicted. Any proceedings againts me on that line, I am confident will not stand. And I do not believe that a person with that frame of mind is obligated to act other than and in accordance with what he is satisfied the effect of the law and the judgment should be and will be. * * *"

The defendant may be correct in his belief that his conviction will be set aside. Be that as it may, he presently stands as a convicted man. All presumptions and intendments on that score are against him until such time as the conviction is reversed or set aside. For the protection of the public this court has adopted the rule

that upon conviction of a crime involving moral turpitude a member of the bar is summarily suspended. Defendant is not a law unto himself and must abide by the suspension regardless of his belief that the conviction will be reversed.

This brings into question the extent of the courts' power to punish for contempt. ORS 33.020(1) provides as follows:

> "* * * when the contempt is not one of those mentioned in paragraphs (a) and (b) of subsection (1) of ORS 33.010, or in subsection (1) of ORS 1.240, it must appear that the right or remedy of a party to an action, suit or proceeding was defeated or prejudiced thereby before the contempt can be punished otherwise than by a fine not exceeding $100."

Paragraphs (a) and (b) of subsection (1) of ORS 33.010 are as follows:

> "(a) Disorderly, contemptuous or insolent behavior toward the judge, while holding the court, tending to impair its authority or to interrupt the due course of a trial or other judicial proceeding.
>
> "(b) A breach of the peace, boisterous conduct or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding."

Subsection (1) of ORS 1.240 is as follows:

> "(1) To preserve and enforce order in his immediate presence, and in the proceedings before

him, when he is performing a duty imposed upon him by statute."

It is obvious that paragraphs (a) and (b) of subsection (1) of ORS 33.010 and subsection (1) of ORS 1.240 pertain to direct contempts in the presence of the court and have no application. It is also apparent that no right or remedy of a party was defeated by the defendant's action. Thus, under ORS 33.020 (1), the imposition of a $100 fine is the maximum punishment for indirect contempts authorized by the legislature. *State v. Brownell*, 79 Or 123, 154 P 428 (1916); *Rust v. Pratt*, 157 Or 505, 72 P2d 533 (1937).

The contempt power is the product of the early rule of English kings. It was the vehicle for assuring the efficiency, dignity of, and respect for the sovereign. As society became more diverse and extensive, the king found it necessary to have some aspects of his power exercised by representatives. The courts acted for the king and their exercise of the power arose from the presumed contempt of the king's authority. Gradually this basis shifted from a power of the courts as adjuncts of the king to one inherent in the courts themselves. It was one of the steps in the rise of the power of the courts in England.

This assumption of power was further enhanced in

this country when the American colonies separated from England by revolution. The American system of government was based upon the constitutional separation of powers of the three established branches of government: the executive, the legislative, and the judicial. This reflected the early Americans' fear of the potential tyranny of concentrated power and was their effort to establish a system of checks and balances. See Goldfarb, The Contempt Power, ch. 1 (1963).

The separation of governmental powers is demonstrated in Article III, Section 1, Oregon Constitution, which is as follows:

> "The powers of the Government shall be divided into three seperate (sic) departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

Referring to the power of the court to punish for contempt, it was stated in *Ex Parte Robinson*, 86 US (19 Wall) 505, 510, 22 L Ed 205 (1873):

> "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. * * *"

It therefore follows that the legislature cannot unreasonably abridge or destroy the judicial power to punish for contempt because the legislature cannot take away a power which is does not give. See Annotation, 121 ALR 215, 216-217 (1939). It may follow that the legislature has the authority to limit the court's power to punish for contempt where the court is a creature of the legislature and not constitutionally established. This question, however, does not have to be decided now as this is a constitutionally established court. Article VII, Section 1, Oregon Constitution.

Rapalje, Contempt, § 11, page 13 (1884), states as follows:

> "In the absence of a constitutional provision on the subject, the better opinion seems to be that legislative bodies have not the power to limit or regulate the inherent power of courts to punish for contempt. This power being necessary to the very existence of a court, as such, the legislature has no right to take it away or hamper its free exercise. This is undoubtedly true in the case of a court created by the constitution. Such a court can go beyond the provisions of the statute, in order to preserve and enforce its constitutional powers, by treating as contempts, acts which may clearly invade them. * * *"

Many jurisdictions refuse to allow the legislature to abridge unreasonably a constitutionally established court's power to punish for contempt. *State v. Estill*,

55 Wash 2d 576, 349 P2d 210 (1960); *In re Assignment of Huff*, 352 Mich 402, 91 NW2d 613 (1958); 12 Am Jur 424, Contempt § 49. Also see cases cited in 121 ALR at 229-231. This is not the universal rule. The constitutions of five states (Arkansas, Georgia, Louisiana, Oklahome, Virginia) specifically grant the legislature authority to regulate the judicial contempt power. Other courts concede the legislature this power. *Douglas v. Adel*, 269 NY 144, 199 NE 35 (1935); *Ex parte Hill*, 229 Al 501, 158 So 531 (1935); *Ex parte King* 263 Ala 497, 83 So2d 241 (1955); *State v. Coleman*, 347 Mo 1238, 152 SW2d 640 (1941); and cases cited in 121 ALR at 227- 229.

In most jurisdictions where the legislature is prohibited from unreasonably abridging or limiting the inherent judicial contempt power of the courts, it is nevertheless recognized that the legislature may make reasonable regulations covering the exercise of the power so long as the regulations do not substantially impair or destroy it. This prevents abuse of the court's power. *John F. Jelke Co. v. Beck*, 208 Wis 650, 242 NW 576 (1932); *LaGrange v. State*, 238 Ind 689, 153 NE2d 593, 69 ALR2d 668 (1958); *State v. Greenwood*, 63 NM 156, 315 P2d 223 (1957). Also see cases at 121 ALR 235-241.

A concise statement of the law applicable to this case was made in *State v. Greenwood*, supra, The de-

fendant in that case had been enjoined by the court from using water from certain wells. He was held in contempt for violation of the court's order. The court sentenced him to 60 days in jail, which sentence was suspended, and to pay a fine of $750. The defendant appealed on the basis he could not be fined more than $50 without a jury trial because of a statute which contained such a limitation. In holding the sentence to be valid, the court said:

> "* * * As this court has stated in the past the power to punish for contempt is inherent in the courts and its exercise is the exercise of the highest form of judicial power. State v. Magee Publishing Co., supra; In re Sloan, supra. The real basis of this power is to be found in the doctrine of separation of powers as provided for in the Organic Act and later in the New Mexico Constitution.
>
> "However, the power of the courts to punish for contempt is not absolute, exclusive and free of all legislative regulation. The separation of powers between the executive, legislature and judiciary was never intended to be complete. Ex parte Grossman, 267 U.S. 87, 45 S.Ct. 332, 69 L.Ed. 527. This court made this clear in the case of Ex parte Magee, 31 N.M. 276, 242 P. 332, 333, when it stated, 'Again the proposition that the three departments of the state government are independent of each other is only relatively and not absolutely, true.' Even the strictest inherent power advocates have conceded at least some authority of the legislature to set up restrictions upon the exercise of the contempt power. Hawkins v. State, 125 Ind. 570, 25 N.E. 818; State v. Morrill, 16 Ark. 384. But, while the legislature may provide rules of procedure which are reasonable regulations of the contempt power it

may not, either by enacting procedural rules or by limiting the penalty unduly, substantially impair or destroy the implied power of the court to punish for contempt. As the court stated in Wyatt v. People, 17 Colo. 252, 28 P. 961, 964:

"'* * * for, though the legislature cannot take away from the courts created by the Constitution the power to punish contempts, reasonable regulations by that body touching the exercise of this power will be regarded as binding.'"

We hold that the power of a constitutionally established court to punish for contempt may be regulated within reasonable bounds by the legislature but not to the extent that the court's power is substantially impaired or destroyed. The provision of ORS 33.020(1) limiting this court's power to punish for an indirect contempt to a fine of $100 except where the right or remedy of a party was prejudiced is an unreasonable limitation upon this court's inherent powers. It is therefore unconstitutional as applied to the facts here as it violates Article III, Section 1, of the Oregon Constitution in that it substantially destroys this court's power to enforce is lawful orders and decrees and is an attempted exercise of a judicial function by the legislative branch of government.

We realize that this is contrary to the following language in *State v. Brownell*, supra:

"It has been urged that, since constitutional courts have inherent power to punish for contempt,

> the legislature has no power to limit their action in this respect. We do not regard Section 671, L.O.L. [ORS 33.020(1)], as limiting their power to punish for contempt, but merely as prescribing the procedure for exercising such power. * * *"

This case was decided in 1916. At that time it might have been possible to consider a $100 fine as merely prescribing the procedure for exercising the contempt power. This is almost fifty years later, and what was then considered not to be a limitation upon the court's power most certainly is such a limitation now. The dollar has been devalued.

Based upon the record herein, this court makes the following findings of fact:

> (1) The defendant was convicted on the 22nd day of April, 1964, in the District Court of the United States for the District of Oregon, of the crime of willfully and knowingly attempting to evade and defeat a large part of the income tax due and owing by him and the conviction has at all times since then remained in full force and effect;
>
> (2) That subsequent thereto, on the 28th day of April, 1964, this court, under Rule I of the rules of this court for admission of attorneys, entered an order summarily suspending defendant from the practice of law in Oregon and said order at all times since its entry has remained in full force and effect;
>
> (3) The defendant had knowledge of the entry of said order at all times subsequently referred to in the balance of these findings of fact:
>
> (4) That on the 22nd day of June, 1964, the defendant, acting as attorney for Harry Baker and

Elsie Baker, attempted to determine by conference with counsel for the State of Oregon whether the case of Harry Baker and Elsie Baker dba Met-all Products v. State of Oregon, Department of Employment, David H. Cameron, Department of Employment Commissioner, Multnomah County Circuit Court case No. 282898, then on appeal to this court, was capable of settlement;

(5) That said acts of the defendant constituted the practice of law and were willful.

Based upon the foregoing findings of fact, this court enters the following conclusion of law:

The defendant is guilt of contempt of this court because of his violation of this court's order entered April 28, 1964, summarily suspending him from the practice of law.

This court therefore enters judgment of conviction against the defendant and sentences him to pay a fine in the sum of $500, payable to the Clerk of this Court within 20 days of the entry of the mandate. Upon the failure of the defendant to pay said fine within the allotted time, the Clerk is directed to issue a warrant for the arrest of the defendant and to direct the arresting officers to deliver him to the Sheriff of Multnomah County for incarceration in the county jail of said county to serve out said fine in accordance with the laws of this state relative to serving time for the nonpayment of fines in criminal matters.